

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DECISION AND ORDER
05-CR-020A

DAVID CAIN, SR.,

Defendant.

On January 18, 2005, a one count indictment was filed against defendant David Cain, Sr. ("Cain Sr.") and his son, David Cain, Jr., charging each with assaulting a federal officer in violation of 18 U.S.C. § 111. Cain Sr. was initially released on bail. However, on May 18, 2005, the government filed a motion to revoke his bail, alleging that he had engaged in witness tampering while on release. A detention hearing was held by Magistrate Judge Leslie G. Foschio, and on May 27, 2005, Magistrate Judge Foschio ordered that Cain Sr. be detained pending trial.

On October 20, 2005, Cain Sr. moved for release on bail based upon a change in circumstances. The government moved to dismiss the motion arguing that it was an untimely "appeal" of a detention order.

Since the basis of the relief sought is a change in circumstances that were not considered by Magistrate Judge Foschio when he initially issued his detention order, the Court finds that the Magistrate Judge should have an opportunity to consider the motion in the first instance. Accordingly, the motion for release (Dkt. No. 43) is

referred to Magistrate Judge Foschio, pursuant to 28 U.S.C. § 636. In the event that the relief sought is denied, defendant Cain Sr. will have an opportunity to appeal that order to this Court pursuant to 18 U.S.C. § 3145. Furthermore, the government's motion to dismiss (Dkt. No. 45) is denied as moot.

IT IS SO ORDERED.

/s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATED: December 19, 2005